

NO. HHD LND CV 15 6056637S	:	SUPERIOR COURT
	:	
LANDMARK DEVELOPMENT	:	
GROUP LLC, ET AL.	:	JUDICIAL DISTRICT
	:	OF HARTFORD
v.	:	LAND USE DOCKET
	:	
EAST LYME WATER AND SEWER	:	
COMMISSION	:	NOVEMBER 27, 2018

MOTION FOR JUDGMENT¹

Plaintiffs Landmark Development Group LLC and Jarvis of Cheshire LLC (collectively, "Landmark") hereby move for the entry of judgment in this matter, specifically an order to the defendant Commission to conditionally grant Landmark's 2012 sewer capacity application for 118,000 gallons per day, with the final, actual allocation being the gallons per day needed to support a Preliminary Site Plan, when approved by the East Lyme Zoning Commission.

This Motion is made at this time because (1) this Court's July 6, 2016 decision, that the Commission must grant Landmark "sufficient capacity to further the development of their project" is now final; (2) the Appellate Court, 184 Conn. App. 303, 306 n.2, held that the Commission on remand "*must grant*" (original emphasis) the application; (3) as a matter of law, "*sufficient capacity to further the development*" has only one meaning – the sewer capacity to support whatever development plan is approved by East Lyme's land use (wetlands and zoning) process – *not the land use or residential density that the defendant Sewer Commission deems acceptable*; (4) there is, therefore, only one legal remedy that this Court can grant at this time in this administrative appeal; and (5) in the past several weeks, the Commission has expressly stated its disagreement with and intent to resist this Court's order, defy this Court again, and continue to violate Landmark's rights.

¹ Attorney Roger Reynolds, representing intervenors Friends of the Oswegatchie Hills Nature Preserve, Inc. and Save the River-Save the Hills, Inc., has not appeared in this docket number, but in a companion case, and is copied in the Certification of Service.

Recited below, supported by an Affidavit of Glenn Russo and public record exhibits and the record of this appeal as on file, are the relevant facts and a legal analysis regarding why this Court must enter judgment at this time.

I. RECAP OF RELEVANT BACKGROUND; COMMISSION ACTIONS
SEPTEMBER 17 TO NOVEMBER 13, 2018.

This Court is fully familiar with the facts of this matter, from the early 2000's, when East Lyme officials first stated their intent to block multi-family / affordable housing development by Landmark by denying sewer access;² through the town's denial that any of Landmark's property was in the sewer service district (overruled by DEEP in 2004); the 2005 denial of any sewer service (overruled by Judge Frazzini in 2011); the Commission's contention in 2012 that it had no capacity for Landmark because all of the town's available sewer capacity was already allocated to others (overruled by this Court); the allocation in March 2014 of 13,000 GPD, based on the towns' three acre lot size zoning – which had already been repealed (invalidated by this Court); the October 2014 allocation of 14,434 GPD, based on a supposedly "scientific formula" but using manipulated data to yield a patently absurd and illegal result (invalidated by this

² The record of this appeal (Commission's Appellate Court Record, p. A421, contains minutes of a February 1, 2001 phone call between Town officials and land use attorney Robert Fuller. Those minutes state in part:

1. NO AVAILABILITY FOR WATER AND SEWER
 - Not in sewer shed, commitment elsewhere for availability. This plan would consume a lot of sewer and would require an extension.
 - Without water and sewer, cannot get affordable housing project through.
 - WATER AND SEWER COMMISSION HAS NO OBLIGATION TO EXTEND TO PROPERTY – DOES NOT FALL UNDER AFFORDABLE HOUSING ACT.

...

Atty. Fuller stated that the Zoning Commission needs a basis for denial. He suggested including the water and sewer report, addressing traffic and environmental, and the Planning Commission's report in the record.

Court); and finally through three years, 2013-16, when the Commission repeatedly lied to this Court, claiming its available capacity was 130,000 to 225,000 GDP, while simultaneously, and without public notice, allocating 166,000 GPD to the nearby Gateway development – and then justifying that action by asserting that the Town plainly had such ample capacity that a capacity study and an application were unnecessary.

Enough.

On July 6, 2016, this Court held, based on the Commission's Gateway subterfuge, that the October 2014 allocation of 14,434 GPD to Landmark was an abuse of discretion and ordered the Commission to grant Landmark "sufficient capacity to further" its development. Exh. A. In August 2018, the Appellate Court affirmed this Court's decision, 184 Conn. App. 303, Exh. B. On October 31, 2018, the Supreme Court denied further review, Exh. C, making this Court's decision a final order.

The following undisputed facts have occurred since the Appellate Court decision, and are supported by attached public records exhibits and Mr. Russo's Affidavit:

1. In September 2018, while the Commission's certification petition in the Supreme Court was pending, Landmark became concerned again that the Commission would try to undermine the Appellate Court ruling by continuing to allocate sewer capacity to Gateway and other users, and then asserting that it had insufficient capacity for Landmark. As a result, on September 17, 2018, Landmark filed with the Commission a letter asking that the Commission approve Landmark's application. Exh. D.

2. In response, at its meeting on September 25, 2018, the Commission, without any notice or hearing, adopted an "Interim Sewer Connection Procedure," Exh. E, which in relevant part states (emphasis added):

WHEREAS, on August 21, 2018, the Appellate Court issued its decision ("Decision") on the Commissions' appeal, which upheld the Trial Court Memorandum of Decision, and held that the Commission is required to

perform a sewer capacity analysis when considering applications to connect to the East Lyme sewer system;³ and

WHEREAS, *the Commission disagrees with the Decision* and has filed a petition for certification to the Connecticut Supreme Court, which is currently pending; and

WHEREAS, by a letter dated September 17, 2018, Landmark requested that the Commission approve an allocation for its full 118,000 gpd sewer capacity request, pending final resolution of its appeal; and

WHEREAS, neither the Trial Court nor the Appellate Court held that Landmark was entitled to the full amount of its capacity request, and the proceedings are stayed until the Supreme Court acts on the Commission's petition for certification. While reserving all of its rights set forth during the appeal process, the Commission nevertheless does not want to ignore the Trial Court and the Appellate Court holding that require a sewer capacity analysis by done in conjunction with a sewer connection permit application.

BE IT THEREFORE RESOLVED, that the East Lyme Water and Sewer Commission, acting as the Town's Water Pollution Control Authority, hereby enacts the following interim procedure:

1. An application to connect to the East Lyme sewer system for a project that either (a) requests a connection for more than 20 residential units or (b) requires more than 5,000 gallons per day of sewage treatment capacity, shall also require an application for determination of sewer capacity pursuant to General Statutes § 7-246a;⁴

2. Said application for determination of sewer capacity shall be submitted either prior to or contemporaneously with a sewer connection application;

3. *An application to connect to the East Lyme sewer system may not be granted if the Commission determines that there is not adequate sewer capacity for the proposed use of land.*

BE IT FURTHER RESOLVED that *the above procedure does not reflect official policy or procedure of the Commission or the Town of East Lyme.*

³ In fact, the Appellate Court opinion says nothing of the kind, and the Resolution contains no citation.

⁴ General Statutes § 7-246a already requires an application for a sewer capacity allocation.

Rather, it is adopted on an interim basis only in direct response to the Appellate Court Decision, *and shall be in place only during the pendency of the Landmark sewer capacity appeal process*. In enacting this interim procedure, *the Commission does not agree with the holdings of the Trial Court Memorandum of Decision or the Appellate Court Decision*. Any findings made pursuant to this interim procedure (i.e. available sewer capacity, etc.) shall be for the purposes of that sewer capacity application only, *and shall not be adopted, incorporated or made part of the record in the pending Landmark sewer appeal*.

3. In September 2018, Commission Chair Mark Nickerson was quoted in *The Day* newspaper as saying that, "The judges can't force us to put sewer in there," and that extending sewer to Landmark would constitute "an unsuitable use." Exh. F.

4. On October 24, 2018, Landmark filed a renewed Freedom of Information Act request, seeking disclosure of all applications or requests for more than 5,000 GPD of sewer capacity, *see* Exh. G.

5. In response to Landmark's FOIA request, the Commission provided an application filed by Gateway for the commercial use portion of its development, a Costco store, requiring 7,650 GPD of capacity; the application was filed under General Statutes § 7-246a, and the "interim procedure."

6. Also in response to the FOIA request, the Commission provided a copy of an "application" filed by Pazzaglia Construction, Exh. H, *for 86,250 GPD*, for a "830G" [sic] development. This application was not accompanied by any site plan or any documents demonstrating that it is an actual development plan, or any evidence of compliance with General Statutes § 8-30g.

7. At a Commission hearing on November 13, 2018, Landmark filed the attached letter, Exh. I, clarifying that if the local land use process results in a site plan approval that requires less than 118,000 GPD, Landmark will accept that allocation.

8. The Commission ignored Landmark's request, processed the Costco application under its interim procedure, and approved the Costco application *without making any*

finding, as required by ¶ 3 of its own interim procedure (Exh. E), as to the town's overall available sewer capacity. Exh. J (minutes of Commission hearing, November 13, 2018).

9. At its regular meeting on November 13, 2018, the Commission scheduled a special meeting for December 11, *to consider what criteria it will devise and use to act on Landmark's application on remand.* Russo Affidavit, Exh. L, ¶ 4.

10. During the November 13 discussion, Chair Nickerson stated that action on Landmark would be based on "What is fair, given the size of our town." Russo Affidavit, Exh. L, ¶ 5.

11. During the discussion, Town Attorney Zamarka told the Commission that it had "wide discretion" in acting on Landmark, and that the Commission's only obligation is to grant capacity "between 14,000 and 118,000. . . ." Exh. K at 3.

12. At the November 13 meeting, contradicting this Court's 2016 ruling that sewer commissions do not control land use, Attorney Roger Reynolds, representing environmental intervenors, advocated that the Commission base the sewer allocation on controlling land use, by granting capacity for 110 residential units (about 20,000 GPD), that being the "average size" of a § 8-30g affordable housing development. Russo Affidavit, Exh. L, ¶ 6.

13. At the November 13 meeting, the Commission discussed action in January 2019 on other sewer capacity applications, including 120 additional residential units for Gateway (and thus above its 275 units / 166,000 GPD); and the above-mentioned Pazzaglia application. Russo Affidavit, Exh. L, ¶ 7.

14. In this discussion, none of the Commissioners or the Town Attorney discussed giving Landmark's application, which dates to 2012, priority over applications filed later, much less in 2018. Russo Affidavit, Exh. L, ¶ 9.

15. At this time, the Town of East Lyme has ample sewer capacity to conditionally grant Landmark's application without impacting other users: (a) the Appellate Court decision, 184 Conn. App. at 317, based on data to 2014, found that the Town has at least

358,000 GPD, minus the Gateway allocation, estimated at 166,000 GPD, leaving 200,000; (b) however, on November 13, Sewer Administrator Kargl stated that the Gateway residential portion is actually only using "about half" of its allocated capacity (Russo Affidavit, Exh. L, ¶ 8), which would add more than 50,000 GPD to the Town's available capacity, making nearly 300,000 GPD available; (c) this Court may take judicial notice of Exh. M, which shows that in 2016, the Town's *total* average monthly discharge was 785,390 GPD, down from 1,089,279 in 2013, and the Town was using only 50.1 percent of total New London treatment plant capacity; and (d) in November 2017, the total state facility flow was only 164,009, which under the formula accepted by Sewer Administrator Kargl in his 2015 deposition would result in:

Town capacity after State set aside (1.5 million - 468,000)	1,022,000
Total flow, October 2017 running monthly average	822,550
State use	164,000
Town use (822,550 - 164,000)	<u>658,550</u>
Available to Town	363,450

However, this calculation is very conservative, because the State facility use of 164,000 GPD is actually part of the 468,000 deducted from the 1.5 million GPD available to the Town. So if this adjustment is made, the Town's current available capacity is 527,450 GPD.

16. In addition, this Court should bear in mind that the State of Connecticut has a contract to use 468,000 of East Lyme's available 1,500,000 GPD at the New London treatment plant, but historically has used no more than 60 percent of this amount, and in recent years, between 30 and 40 percent. As a result, East Lyme is in no danger of exceeding its total treatment plant capacity.

17. The record of this appeal, supplemented by facts of the past 60 days, demonstrate that (a) Landmark's land is in the Town's sewer service district; (b) the Town has approved an extension of the public sewer line to two locations which abut Landmark's land, such that Landmark does not need new permission to extend the sewer system to connect to the sewer system; (c) there is ample capacity to grant Landmark's application, without disenfranchising others; (d) through six years of hearings and remands, the Commission has

never identified any engineering issue with respect to Landmark physically connecting to the public system; (e) Landmark has a final court order to the Commission that it grant Landmark "sufficient capacity" to proceed with its development; and (f) the Commission disagrees with and intends to violate this court order.

II. BASES FOR ENTRY OF JUDGMENT

1. This case is an administrative appeal. It is axiomatic that in an administrative appeal, if the record makes it clear that there is only one remedy that will remedy the defendant's violation, the trial court is empowered and obligated to grant that remedy. *See, e.g., Thorne v. Zoning Commission*, 178 Conn. 198 (1979).

2. The Appellate Court, 184 Conn. App. at 306 n.2, held that the Commission "*must* grant" Landmark's application, and without need for further evidentiary determination or discretionary action.

3. This Court has ruled that the so-called "*Forest Walk*" factors are inapplicable to this case, given the Commission's conduct. Thus, at this point, the Commission cannot act on Landmark's application by devising a new formula or ratio based on acreage, proportionality, or similar factors.

4. It is also clearly established that the Commission cannot allocate sewer capacity based on controlling land use, such as density.

5. This Court's order to the Commission is not to pick a number between 14,434 and 118,000 GPD, but to grant Landmark what it needs to proceed with its land use applications. At this time, "sufficient capacity" for Landmark's development is not a matter of Commission discretion because the Town has ample capacity to grant Landmark's application, and may not use the allocation to control density.

6. At this time, Landmark's application, pending since 2012, must be given priority as against Gateway's application for sewer, which occurred after Landmark's, as well as newly-

filed applications. The Commission cannot undermine Landmark's rights by giving away capacity while this case proceeds.⁵

7. Landmark is entitled to be treated equally with Gateway, but in fact requests substantially less gallorage than Gateway even though Landmark's parcel is much larger: while Gateway has been approved (166,000 GPD) for 11.0 percent of the Town's total allocation, Landmark (at 118,000) seeks only 7.8 percent, and thus Landmark's application is for 30 percent less than Gateway.

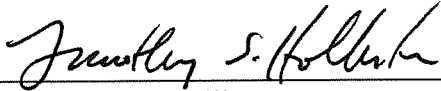
8. Sewer Administrator Kargl, in 2015, testified that the Town had so much available capacity that Gateway's application did not even require a review process; Landmark is now entitled to equal treatment.

9. This court has inherent authority to enforce its own orders. The Commission is poised to violate this Court's order.

For these reasons, Landmark moves that this Court enter judgment, directing the defendant Commission to grant Landmark's sewer capacity application, and preserve that allocation until Landmark obtains Preliminary Site Plan approval, at which time the allocation shall be modified to the amount needed to support that Site Plan.

⁵ Landmark's appeal of the East Lyme Zoning Commission's 2015 denial of a zone change and Preliminary Site Plan is pending before Judge Berger.

PLAINTIFFS,
LANDMARK DEVELOPMENT GROUP LLC
AND JARVIS OF CHESHIRE LLC

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Motion for Judgment and attached Exhibits were electronically delivered this 27th day of November, 2018, to all counsel of record and written consent for electronic delivery has been received from all counsel.

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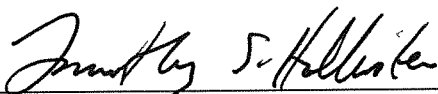

Timothy S. Hollister
Commissioner of the Superior Court

Exhibit A

2016 WL 4497652

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Landmark Development Group, LLC et al.

v.

East Lyme Water & Sewer Commission

HHDCV156056637S

|

July 6, 2016

Opinion

COHN, J.T.R.

*1 Prior to the commencement of the present action, the plaintiff, Landmark Development Group, LLC, brought an appeal against the defendant, East Lyme Water and Sewer Commission, regarding a sewer capacity determination. Before rendering a decision, the court reviewed the record, including the methodology for the grant of capacity. On June 26, 2014, the court ruled that the defendant must reconsider the allocation of sewer capacity in the amount of 13,000 gallons per day to the plaintiff, Landmark Development Group, LLC. See *Landmark Development Group, LLC v. East Lyme Water & Sewer Commission*, Superior Court, judicial district of Hartford, Docket No. CV-13-6040390-S (June 26, 2014, Cohn, J.). In so ruling, the court indicated that the defendant must consider the *Forest Walk, LLC v. Water Pollution Control Authority*, 291 Conn. 271, 968 A.2d 345 (2009) factors. More specifically, in regard to capacity, the defendant must “consider the remaining capacity for the entire town, the land area represented by the property versus the available land area in the town the safe design standards for the public sewer, and the percentage of the allocation versus the total remaining capacity.” *Landmark Development Group, LLC v. East Lyme Water & Sewer Commission*, *supra*, Superior Court, Docket No. CV-13-6040390-S. On July 29, 2014, the court denied the defendant's motion to reargue. See *Landmark Development Group, LLC v. East Lyme Water & Sewer Commission*, Superior Court, judicial district of Hartford, Docket No. CV-13-6040390-S (June 29, 2014, Cohn, J.).

In the present action, which was commenced on November 24, 2014, the plaintiffs, Landmark Development Group, LLC, and Jarvis of Cheshire, LLC, ask the court to review a grant of capacity of 14,434 gallons per day to the plaintiffs by the Board. On February 19, 2015, the plaintiffs filed their appeal brief. On March 16, 2015, the defendant, East Lyme Water and Sewer Commission, filed its appeal brief.¹ On March 30, 2015, the plaintiffs filed a motion for permission to supplement the record in administrative appeal. The court heard oral argument on April 2, 2015. On the same day, the court granted the plaintiffs' request, but only as to exhibit C, a letter from Mark S. Zamarka.

On July 23, 2015, the plaintiffs filed a motion to conduct further discovery/deposition, and to supplement the record. Specifically, the plaintiffs asked the court for permission to take the deposition of the Board's administrator, Bradford Kargl, regarding approval of the connection application by Gateway (a similarly-situated apartment complex being developed) where over 160,000 gallons per day capacity was contemplated. The motion was granted by the court on September 8, 2015. The deposition revealed that although Kargl was aware of the Gateway capacity need (Plaintiffs' Exhibit 1, Deposition of Kargl, pp. 39-42/A28-A31, 52/A41, 62/A50), and had the duty to monitor this need (Plaintiffs' Exhibit 1, pp. 15/A9, 17/A10, 61-63/A49-51, 69/A57), he approved the connection application without making a capacity determination (Plaintiffs' Exhibit 1, pp. 33/A23, 66-71/A54-58, 74/A62), and without further reference to the Board (Plaintiffs' Exhibit 21).²

*2 The court, as indicated in prior rulings, does not believe that a capacity determining action is ministerial, but is instead a matter of discretion for the Board. See *Forest Walk, LLC v. Water Pollution Control Authority*, *supra*, 291 Conn. 282 (“[A] municipality has wide discretion in connection with the decision to supply sewerage ... Although this discretion is not absolute, [t]he date of construction, the nature, capacity, location, number and cost of sewers and drains are matters within the municipal discretion with which the courts will not interfere, unless there appears fraud, oppression or arbitrary action” [internal quotation marks omitted]); see also *Straw Pond Associates, LLC v. Water Pollution Control Authority*, Superior Court, judicial district of Waterbury, Docket No. CV-08-4015126-S (March 8,

2011, Gallagher, J.) (discretionary standard of review applied to determination of availability of sewer capacity). The defendant's actions are discretionary even where there is a request for a sewer extension permit. See *Landmark Development Group, LLC v. East Lyme*, 374 Fed.Appx. 58, 60 (2d Cir. 2010) ("Plaintiffs had no legitimate claim of entitlement to a sewer-extension permit. Defendants plainly have discretion to deny such permits").

In light of the supplemental evidence, the court concludes that there is at least 200,000 gallons per day capacity (358,000 gallons per day less 160,000 gallons per day to Gateway) for the entire sewer system.³ The defendant had broad discretion in determining capacity, but the defendant was obligated to consider capacity when it approved the connection application for Gateway. As to the plaintiff, the court finds that with the large amount of capacity remaining, the capacity figure of 14,434 gallons per day is excessively low. There is an abuse of discretion⁴ that the Board must correct. Although the Board is not required to grant the plaintiffs their request for 118,000 gallons per day, the capacity figure of 14,434 gallons per day is insufficient in view of the

present remaining capacity of at least 200,000 gallons per day, and in view of the 160,000 gallons per day that was approved for Gateway. In reconsidering the allocation of the sewer capacity, the Board must comply with applicable sewer statutes, regulations and ordinances, and the Board should take into account the demands of the plaintiffs' sewer project and the effect on remaining capacity. Nevertheless, the Board must provide the plaintiffs with sufficient capacity to further the development of their project, and, as such, the Board may not settle on a figure for capacity that would completely foreclose the development of the plaintiffs' project.

*3 This matter is remanded to the Board for a further ruling and is a final decision for purposes of appeal.

SO ORDERED.

All Citations

Not Reported in A.3d, 2016 WL 4497652, 62 Conn. L. Rptr. 693

Footnotes

- 1 The two intervening entities, Friends of the Oswegatchie Hills Nature Preserve, Inc., and Save the River-Save the Hills, Inc., have also filed briefs in this action.
- 2 The fact that Kargl failed to even review capacity as to Gateway distinguishes this case from the *Forest Walk* factors which have guided the court to this point.
- 3 In its prior June 26, 2014 decision, this court noted that, as to remaining capacity, "[t]he record before the court shows a range of 130,000 gpd to 225,000 gpd. At the meeting of the commission on February 25, 2014, the figure of 177,000 gpd was used as a compromise. In court on May 27, 2014, the commission's attorney conceded that the commission would not object to a figure of 250,000 gpd. Finally, Landmark points to a reduced usage by the town and state facilities so that the correct figure is between 308,000 gpd and 358,000 gpd." *Landmark Development Group, LLC v. East Lyme Water & Sewer Commission*, *supra*, Superior Court, Docket No. CV-13-6040390-S. More recently, during the commission's October 2014 remand proceeding and resolution, the commission applied the plaintiff's figure of 358,000 gallons per day. (Amended Return of Record, Exhibit D, Post-proceeding Exhibits 2, 3.)
- 4 "When a water pollution control authority performs its administrative functions, a reviewing court's standard of review of the [authority's] action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion ... Moreover, there is a strong presumption of regularity in the proceedings of a public agency, and we give such agencies broad discretion in the performance of their administrative duties, provided that no statute or regulation is violated." (Citation omitted; internal quotation marks omitted.) *Forest Walk, LLC v. Water Pollution Control Authority*, *supra*, 291 Conn. 285-86.

Exhibit B

184 Conn.App. 303
Appellate Court of Connecticut.

LANDMARK DEVELOPMENT GROUP, LLC, et al.

v.

WATER AND SEWER COMMISSION
OF the TOWN OF EAST LYME

(AC 39804), (AC 39806)

|
Argued April 10, 2018

|
Officially released August 21, 2018

Synopsis

Background: Property owners sought judicial review of a decision of town's water and sewer commission allocating only 14,434 gallons per day in sewer treatment capacity to owners' housing development. The Superior Court, Judicial District of Hartford, Cohn, Judge Trial Referee, 2016 WL 4497652, sustained owners' appeal and ordered commission to grant owners' application for determination of sewer treatment capacity. Commission appealed.

Holdings: The Appellate Court, Bear, J., held that:

trial court properly allowed owners to supplement record with evidence of allocation to another apartment complex;

trial court prior ruling regarding factors for allocating capacity was not law of the case; and

trial court properly sustained owners' appeal.

Affirmed.

Attorneys and Law Firms

Mark S. Zamarka, with whom, on the brief, was Edward B. O'Connell, New London, for the appellant in AC 39804 (defendant).

Roger F. Reynolds, with whom were John M. Looney, Jr., Hartford, and, on the brief, Andrew W. Minikowski, for the appellants in AC 39806 (intervenors).

Timothy S. Hollister, with whom was Beth Bryan Critton, Hartford, for the appellees in both appeals (plaintiffs).

DiPentima, C.J., and Alvord and Bear, Js.

Opinion

BEAR, J.

***1 *306** This chapter of the protracted dispute between the town of East Lyme (town), and the plaintiffs, Landmark Development Group, LLC, and Jarvis of Cheshire, LLC, involves the plaintiffs' application to the defendant,¹ the town's Water and Sewer Commission (commission), for a determination of sewer treatment capacity. The commission appeals from the judgment of the Superior Court sustaining the plaintiffs' appeal and ordering the commission to grant the plaintiffs' application.² On appeal, the commission argues ***307** that the court (1) abused its discretion by allowing the plaintiffs to submit supplemental evidence to the court, and (2) improperly concluded that the commission abused its discretion by allocating to the plaintiffs 14,434 gallons per day in sewer treatment capacity. We affirm the judgment of the court.

***2** The following facts and procedural history are relevant to our disposition of this appeal.³ The plaintiffs own a 236 acre parcel of land in the Oswegatchie Hills area of the town, on which the plaintiffs sought to construct an 840 unit housing development. Giving rise to the present appeal is the plaintiffs' application to the commission for a determination of sewer treatment capacity, which the plaintiffs filed on June 1, 2012. In this application, the plaintiffs requested that 118,000 gallons per day of the town's sewer treatment capacity be reserved for its proposed housing development in the Oswegatchie Hills. In a December, 2012 resolution, the commission found that the plaintiffs had requested a disproportionately large amount of the town's remaining sewer treatment capacity and, therefore, denied the plaintiffs' application. The plaintiffs appealed the commission's decision to the Superior Court, which, on January 16, 2014, remanded the case to the commission for a clarification of its 2012 resolution (first remand). Specifically, the court sought clarification as to the amount of capacity the commission was willing to allocate to the plaintiffs and a justification ***308** for that amount. The court also ordered that the parties report back to court on March 17, 2014.

Pursuant to the court's January, 2014 order, the commission addressed the plaintiffs' application at its February, 2014 regular meeting. Following the meeting, the commission allocated to the plaintiffs 13,000 gallons per day in sewer treatment capacity. The parties appeared before the court in May, 2014, to resolve, inter alia, whether the commission's allocation of 13,000 gallons per day was an abuse of discretion. On June 23, 2014, the court sustained the plaintiffs' appeal and remanded the matter to the commission (second remand). In reaching this conclusion, the court relied on *Forest Walk, LLC v. Water Pollution Control Authority*, 291 Conn. 271, 968 A.2d 345 (2009),⁴ and *Dauti Construction, LLC v. Water & Sewer Authority*, 125 Conn. App. 652, 10 A.3d 84 (2010), cert. denied, 300 Conn. 924, 15 A.3d 629 (2011). The court found that the commission's allocation of 13,000 gallons per day was "inappropriately low" for the following reasons: (1) the record did not indicate a specific amount of available capacity before considering the plaintiffs' application; (2) the commission made no finding regarding the area of the plaintiffs' development versus the land area of the town; (3) the commission based its decision on data that was not current; (4) none of the commission's capacity for possible future development had been requested since the reserve for future development was created in 2004; and (5) the plaintiffs requested only a small amount of the commission's remaining capacity.

***309** At its October 28, 2014 regular meeting, the commission again considered the plaintiffs' application. On the basis of the factors set out in *Forest Walk, LLC v. Water Pollution Control Authority*, supra, 291 Conn. at 295–96, 968 A.2d 345 (*Forest Walk* factors); see footnote 4 of this opinion; the commission derived a formula to determine what it considered to be an appropriate sewer capacity allocation for the plaintiffs. The formula provided: 358,000 gallons per day of available capacity divided by 5853 total acres of the town, is equal to X divided by 236 acres owned by the plaintiffs, where X equals the appropriate capacity to allocate to the plaintiffs. Application of this formula determined that 14,434 gallons per day of sewer treatment capacity was an appropriate allocation. The plaintiffs again appealed the commission's decision to the Superior Court.

****3** On July 6, 2016, the court issued a memorandum of decision again remanding the matter to the commission

(third remand). In its memorandum of decision, the court noted the following relevant procedural history: "In the present action, which was commenced on November 24, 2014, the plaintiffs ... ask the court to review a grant of capacity of 14,434 gallons per day to the plaintiffs by the [commission]. On February 19, 2015, the plaintiffs filed their appeal brief. On March 16, 2015, the [commission] ... filed its appeal brief. On March 30, 2015, the plaintiffs filed a motion for permission to supplement the record in an administrative appeal. The court heard oral argument on April 2, 2015. On the same day, the court granted the plaintiffs' request, but only as to exhibit C, a letter from Mark S. Zamarka.

"On July 23, 2015, the plaintiffs filed a motion to conduct further discovery [including the taking of a] deposition and to supplement the record. Specifically, the plaintiffs asked the court for permission to take the ***310** deposition of the [commission's] administrator, Bradford Kargl, regarding the approval of the connection application by Gateway (a similarly-situated apartment complex being developed) where over 160,000 gallons per day capacity was contemplated. The motion was granted by the court on September 8, 2015. The deposition revealed that although Kargl was aware of the Gateway capacity need ... and had a duty to monitor this need ... he approved the connection application without making a capacity determination ... and without further reference to the [commission]."

Thereafter, the court stated: "In light of the supplemental evidence, the court concludes that there is at least 200,000 gallons per day capacity (358,000 gallons per day less 160,000 gallons per day to Gateway) for the entire sewer system. The [commission] had broad discretion in determining capacity, but the [commission] was obligated to consider capacity when it approved [Gateway's] connection application As to the plaintiffs, the court finds that with the large amount of capacity remaining, the capacity figure of 14,434 gallons per day is excessively low. There is an abuse of discretion that the [commission] must correct. Although the [commission] is not required to grant the plaintiffs their request for 118,000 gallons per day, the capacity figure of 14,434 gallons per day is insufficient in view of the present remaining capacity of at least 200,000 gallons per day, and in view of the 160,000 gallons per day that was approved for Gateway. In reconsidering the allocation of the sewer capacity, the [commission] must comply with

applicable sewer statutes, regulations and ordinances, and the [commission] should take into account the demands of the plaintiffs' sewer project and the effect on remaining capacity. Nevertheless, the [commission] must provide the plaintiffs with sufficient capacity to further the development of their project, and, as such, the [commission] may *311 not settle on a figure for capacity that would completely foreclose the development of the plaintiffs' project." (Footnotes omitted.) This appeal followed.

I

The first issue that we must resolve is whether the court abused its discretion by allowing the plaintiffs to submit supplemental evidence (Gateway evidence) pursuant to General Statutes § 8-8(k)(2). The commission argues that the Gateway evidence concerned a sewer connection permit, which does not require a determination of sewer treatment capacity and is a matter that the commission does not handle, rendering the evidence irrelevant and unnecessary for the equitable disposition of the appeal.

The abuse of discretion standard governs our review of a trial court's decision to admit supplemental evidence under § 8-8(k). See *Parslow v. Zoning Board of Appeals*, 110 Conn. App. 349, 353–54, 954 A.2d 275 (2008). "When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness.... We will reverse the trial court's ruling only if it could not reasonably conclude as it did.... Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done.... We do not ... determine whether a conclusion different from the one reached could have been reached." (Citations omitted; internal quotation marks omitted.) *Id.*, at 354, 954 A.2d 275.

*4 Section 8-8(k) provides in relevant part: "The court shall review the proceedings of the board and shall allow any party to introduce evidence in addition to the contents of the record if ... (2) it appears to the court that additional testimony is necessary for the equitable disposition of the appeal." See also *312 *Clifford v. Planning & Zoning Commission*, 280 Conn. 434, 447, 908 A.2d 1049 (2006) ("[a]n appeal from an administrative tribunal should

ordinarily be determined upon the record of that tribunal, and only when that record fails to present the hearing in a manner sufficient for the determination of the merits of the appeal, or when some extraordinary reason requires it, should the court hear evidence" [internal quotation marks omitted]). " '[A]llowance at trial of additional evidence under the concept of evidence "necessary for the equitable disposition of the appeal," under [§] 8-8(k)(2)], has generally received a restrictive interpretation to avoid review of the agency's decision based in part on evidence not presented to the agency initially.' " *Gevers v. Planning & Zoning Commission*, 94 Conn. App. 478, 489, 892 A.2d 979 (2006).

Here, the Gateway evidence was necessary for the equitable disposition of the appeal. The Gateway evidence established that, even though the commission concluded, after it applied the *Forest Walk* factors, that it did not have sufficient capacity to grant the plaintiffs' application for up to 118,000 gallons per day, Gateway had, in effect, been granted, without application of the *Forest Walk* factors,⁵ an allocation of approximately 166,000 gallons per day following the approval of its connection permit. The Gateway evidence, therefore, was relevant for the court to be able to determine that the plaintiffs, when compared to Gateway, had been treated inequitably by the commission. Unlike Gateway, which had been able to build its development, the plaintiffs, because of the commission's 14,434 gallon per day allocation, did not have sufficient capacity to satisfy the estimated sewage requirements of their projected 840 unit development, despite the existence of adequate *313 available capacity to grant the plaintiffs' request of up to 118,000 gallons per day.⁶

Moreover, the plaintiffs did not have the opportunity to present the Gateway evidence to the commission during the initial hearing, the first remand, or the second remand. Our review of the record shows that the events concerning Gateway occurred in 2014 and 2015, and that the plaintiffs became aware of the Gateway evidence in 2015. Therefore, when the plaintiffs filed their motion under § 8-8(k)(2) in March, 2015, it was their first reasonable opportunity to bring the Gateway evidence to the court's and the commission's attention. Accordingly, because the Gateway evidence could have influenced the commission's decision regarding the plaintiffs' application, and the plaintiffs sought to introduce this evidence at the earliest opportunity, the court did not abuse its discretion by

granting the plaintiffs' motion to supplement the record. See *Clifford v. Planning & Zoning Commission*, supra, 280 Conn. at 449, 908 A.2d 1049 (“[t]o penalize the plaintiff for the absence in the record of documents that could have affected the commission's decision on the site plan application, when the plaintiff had no reasonable opportunity to bring such documents to the attention of the commission, would be simply *314 unfair and not in accordance with basic principles of equity”).⁷

II

****5** The commission's second claim on appeal is that the court improperly concluded that it abused its discretion by allocating to the plaintiffs 14,434 gallons per day of sewer treatment capacity. Specifically, the commission argues that the court erred because it disregarded its ruling from a prior remand concerning the application of the *Forest Walk* factors. See footnote 4 of this opinion. The commission also argues that the court erred by basing its decision, at least in part, on the supplemental evidence admitted pursuant to § 8-8(k)(2) and by holding that the commission was obligated to consider the Gateway evidence in reaching its decision on the plaintiffs' application. We address those arguments in turn.

*315 A

The commission argues that the trial court's ruling regarding application of the *Forest Walk* factors “constitutes an interlocutory ruling that should have been treated as the law of the case in subsequent proceedings.” We disagree.

“We consider whether a court correctly applied the law of the case doctrine under an abuse of discretion standard. The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, *in the absence of some new or overriding circumstance*.” (Emphasis added; internal quotation marks omitted.) *Perugini v. Giuliano*, 148 Conn. App. 861, 879–80, 89 A.3d 358 (2014).

Here, the court did not abuse its discretion by disregarding the *Forest Walk* factors in reaching its decision to sustain the plaintiffs' second appeal and remand the matter, for the third time, to the commission. In the court's June 23, 2014 remand order, it acknowledged that *Forest Walk, LLC*, “indicate[s]” that, “with regard to capacity, under the substantial evidence test, the commission must consider” the four factors. At the time the court issued its June, 2014 remand order, however, it was not aware of the Gateway evidence. In light of the Gateway evidence—which established new or overriding circumstances—the court properly exercised its discretion in disregarding the *Forest Walk* factors, sustaining the plaintiffs' appeal, and remanding the matter to the commission.⁸

*316 B

The commission next argues that the court improperly concluded that it abused its discretion by allocating to the plaintiffs 14,434 gallons per day of sewer capacity. Specifically, the commission argues that the court improperly (1) concluded that it was obligated to consider the Gateway evidence in deciding the plaintiffs' application, and (2) based its decision, at least in part, on the Gateway evidence.

“In considering an application for sewer service, a water pollution control authority performs an administrative function related to the exercise of its powers.... When a water pollution control authority performs its administrative functions, a reviewing court's standard of review of the [authority's] action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion Moreover, there is a strong presumption of regularity in the proceedings of a public agency, and we give such agencies broad discretion in the performance of their administrative duties, provided that no statute or regulation is violated....

“With respect to factual findings, a reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the authority] must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [authority].... The question is not whether the trial court would have reached the same conclusion, but whether the record before the [authority] supports the

decision reached.... *317 If a trial court finds that there is substantial evidence to support a [water pollution control authority's] findings, it cannot substitute its judgment as to the weight of the evidence for that of the [authority].... If there is conflicting evidence in support of the [authority's] stated rationale, the reviewing court ... cannot substitute its judgment for that of the [authority].... The [authority's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given.... Accordingly, we review the record to ascertain whether it contains such substantial evidence and whether the decision of the defendant was rendered in an arbitrary or discriminatory fashion.” (Citations omitted; footnote omitted; internal quotation marks omitted.) *Forest Walk, LLC v. Water Pollution Control Authority*, supra, 291 Conn. at 285–87, 968 A.2d 345. We review the court's decision to determine if, when reviewing the decision of the administrative agency, it acted unreasonably, illegally, or in abuse of its discretion. See *Wasfi v. Dept. of Public Health*, 60 Conn. App. 775, 781, 761 A.2d 257 (2000), cert. denied, 255 Conn. 932, 767 A.2d 106 (2001).

**6 On the basis of our previous conclusions in this opinion—i.e., that the court did not abuse its discretion by (1) supplementing the record with the Gateway evidence and (2) disregarding the *Forest Walk* factors—we conclude that the court did not act unreasonably, illegally, or in abuse of its discretion when it sustained the plaintiffs' appeal and remanded the matter to the commission. Because the court properly admitted the Gateway evidence, it was free to consider that evidence in reaching its decision on the plaintiffs' appeal. That evidence demonstrated that the record, as supplemented,

did not reasonably support the conclusion of the commission to grant a 14,434 gallon daily allocation. The evidence in the record as supplemented established that the commission had an available capacity of 358,000 gallons per day, less the 166,000 gallons per day that was effectively allocated to Gateway. There also was evidence that an administrator of the commission, Kargl, was aware of Gateway's capacity need and *318 the existence of the plaintiffs' then pending application. Kargl, however, approved Gateway's application without making a determination of the impact of the grant to Gateway on the plaintiffs' application in light of the remaining capacity available to the town. On the basis of this evidence, the court properly determined that the commission abused its discretion when it granted to the plaintiffs only 14,434 gallons per day of its 118,000 gallons per day request, despite allowing, without applying the *Forest Walk* factors, Gateway's 166,000 gallons per day connection permit application. On the basis of the record as supplemented, the court, in the exercise of its discretion, could reasonably conclude that the commission treated the plaintiffs inequitably and that an injustice had been done. See *Parslow v. Zoning Board of Appeals*, supra, 110 Conn. App. at 354, 954 A.2d 275.

The judgment is affirmed.

In this opinion the other judges concurred.

All Citations

--- A.3d ----, 184 Conn.App. 303, 2018 WL 3966966

Footnotes

- 1 On February 20, 2015, two entities, Friends of the Oswegatchie Hills Nature Preserve, Inc., and Save the River-Save the Hills, Inc., submitted a verified petition to intervene, pursuant to General Statutes § 22a-19, in the appeal between the plaintiffs and the commission. In the petition, the entities argued, inter alia, that the plaintiffs' "application involves conduct which is reasonably likely to have the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water and other natural resources of the State of Connecticut." The petition highlighted several environmental considerations and noted that the Superior Court had found previously that the plaintiffs' development posed a risk of considerable harm to the Oswegatchie Hills. On March 18, 2015, the court granted the petition to intervene. Both the commission and the intervenors have appealed from the court's judgment sustaining the plaintiffs' appeal. The commission's appeal is assigned docket number AC 39804. The intervenors' appeal is assigned docket number AC 39806. The intervenors did not appear in the proceedings before the commission to determine the sewer treatment capacity available for the use of the plaintiffs, and did not submit any evidence in support of their claims. Because the intervenors' claims on appeal essentially are the same as the claims raised by the commission, and rely on the record of the proceedings before the commission made by the plaintiffs and the commission witnesses, we address both appeals in a single opinion.

- 2 Initially, the plaintiffs contended that the judgment of the trial court was not an appealable final judgment, while the commission argued that it was. At oral argument before this court, the plaintiffs' counsel conceded that the court's July, 2016 decision was an appealable final judgment. We agree and note that "[a] judgment of remand is final if it so concludes the rights of the parties that further proceedings cannot affect them.... A judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations that are not merely ministerial." (Citations omitted; internal quotation marks omitted.) *Kaufman v. Zoning Commission*, 232 Conn. 122, 130, 653 A.2d 798 (1995). Here, the court's judgment so concluded the rights of the parties because it ordered that the commission *must* grant the plaintiffs' application.
- 3 The dispute between the plaintiffs and the town has been ongoing for approximately eighteen years. Most of the facts and procedural history related to the protracted dispute are not relevant to the issues in this appeal.
- 4 In its memorandum of decision, the court noted that *Forest Walk, LLC*, "indicate[s] the following to the court with regard to this appeal With regard to capacity, under the substantial evidence test, the commission must consider [1] the remaining capacity for the entire town, [2] the land area represented by the property versus the available land area in the town, [3] the safe design standards for public sewers, and [4] the percentage of allocation versus the total remaining capacity." We refer to these as the *Forest Walk* factors.
- 5 Gateway, unlike the plaintiffs, did not make an allocation application prior to constructing its development.
- 6 The court found "that with the large amount of capacity remaining, the capacity figure of 14,434 gallons per day is excessively low. There is an abuse of discretion that the [commission] must correct. Although the [commission] is not required to grant the plaintiffs their request for 118,000 gallons per day, the capacity figure of 14,434 gallons per day is insufficient in view of the present remaining capacity of at least 200,000 gallons per day, and in view of the 160,000 gallons per day that was approved for Gateway.... Nevertheless, the [commission] must provide the plaintiffs with sufficient capacity to further the development of their project, and, as such, the [commission] may not settle on a figure for capacity that would completely foreclose the development of the plaintiffs' project." From this finding, we can infer that the court also found that the grant of 14,434 gallons per day foreclosed the plaintiffs from moving forward with their development.
- 7 Our Supreme Court's decision in *Clifford v. Planning & Zoning Commission*, *supra*, 280 Conn. at 434, 908 A.2d 1049, informs our resolution of this issue. In *Clifford*, the defendant commission (defendant) approved the proposal of the defendant construction company (company) to store dynamite on the company's property. *Id.*, at 437, 908 A.2d 1049. The plaintiff, Thomas Clifford, appealed to the trial court, and moved under § 8-8(k)(2) to introduce supplemental evidence. *Id.*, at 437-38, 908 A.2d 1049. Specifically, Clifford sought to introduce prior site plan approvals for the property at issue, which established, *inter alia*, that the storage of hazardous and demolition materials on the property was expressly prohibited and that before any further development could take place on the property, the company would need the approval of the inland wetlands commission. *Id.*, at 445-46, 908 A.2d 1049. The trial court denied the motion. *Id.*, at 438, 908 A.2d 1049. On appeal, our Supreme Court concluded that the trial court's denial of Clifford's motion under § 8-8(k)(2) was an abuse of discretion. *Id.*, at 445, 908 A.2d 1049. The court held that the additional evidence was necessary for the equitable disposition of the appeal for two reasons. *Id.*, at 448, 908 A.2d 1049. First, "the evidence that [Clifford] sought to introduce consisted of information that, viewed on its face, could well have affected the [defendant's] consideration of [the company's] site plan application if it had been brought to the [defendant's] attention, because the [evidence] revealed conditions that the [defendant] itself previously had imposed upon [the company]" *Id.* Second, the motion under § 8-8(k)(2) was Clifford's "first reasonable opportunity to bring to the court's attention the limitations on the use of [the company's] property that may well have affected the approval of the site plan application." *Id.*, at 448-49, 908 A.2d 1049.
- 8 The court expressly stated that part of the Gateway evidence, specifically, the deposition of Kargl, established facts that made this case distinguishable from *Forest Walk, LLC*.

Exhibit C

330 Conn. 937
Supreme Court of Connecticut.

LANDMARK DEVELOPMENT GROUP, LLC, et al.

v.

WATER AND SEWER COMMISSION
OF the TOWN OF EAST LYME

Decided October 31, 2018

Attorneys and Law Firms

Mark S. Zamarka, in support of the petition.

Timothy S. Hollister, in opposition.

Opinion

***1** The defendant's petition for certification to appeal from the Appellate Court, 184 Conn. App. 303 (AC 39804), is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

All Citations

Slip Copy, 330 Conn. 937, 2018 WL 5925181 (Table)

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330 Conn. 937
Supreme Court of Connecticut.

LANDMARK DEVELOPMENT GROUP, LLC, et al.

v.

WATER AND SEWER COMMISSION
OF the TOWN OF EAST LYME

Decided October 31, 2018

Attorneys and Law Firms

Roger F. Reynolds, in support of the petition.

Timothy S. Hollister, in opposition.

Opinion

*1 The petition by the intervening defendants Friends of the Oswegatchie Hills Nature Preserve, Inc., and Save the River-Save the Hills, Inc., for certification to appeal from the Appellate Court, 184 Conn. App. 303 (AC 39806), is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

All Citations

Slip Copy, 330 Conn. 937, 2018 WL 5920545 (Table)

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Exhibit D



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September 17, 2018

VIA PDF TO ATTORNEY ZAMARKA

Mr. Mark Nickerson, Chair,
and Commission Members
Water and Sewer Commission
Town of East Lyme
108 Pennsylvania Avenue
P. O. Box 519
Niantic, CT 06357-0519

Mr. Bradford C. Kargl
Municipal Utility Engineer
Water and Sewer Utilities
Town of East Lyme
108 Pennsylvania Avenue
P. O. Box 519
Niantic, CT 06357-0519

Re: *Landmark Development Group, LLC, et al. v. East Lyme Water and Sewer Commission*

Dear Chair Nickerson, Commission Members, and Mr. Kargl:

It has come to our attention that the Commission will be meeting in executive session on September 18, 2018 to consider Landmark's sewer capacity allocation application, and will conduct its regular meeting on September 25, 2018.

The purpose of this letter is to request that the Commission, at its next regular meeting, approve an allocation of sewer capacity to Landmark of 118,000 gpd, until such time as the parties obtain a final and unappealable decision regarding Landmark's sewer capacity application.

At this time, a trial court judgment, affirmed by the Appellate Court, requires the Commission to grant Landmark "sufficient capacity to further the development of [Landmark's] project," and "may not settle on a figure for capacity that would completely foreclose the development of [Landmark's] project." Moreover, in its court filings, the Commission has conceded that it must grant Landmark's application.

September 17, 2018

Page 2

Landmark has a right to ensure that the Town of East Lyme does not undercut Landmark's judgment by allocating sewer capacity to others, especially those whose applications or administrative requests were filed after 2012. Meanwhile, Landmark has become aware of applications made to Mr. Kargl or the Commission that will require sewer allocations or commitments. The Town cannot defeat Landmark's rights to sewer capacity by allocating capacity to others, or at some future time deny Landmark's application due to third-party allocations that occurred while Landmark's court case was pending. Landmark is prepared to seek a court order to enforce its rights, but hopes that the Commission will at least recognize Landmark's right to an interim protection of its position, as well as avoid Town expense of opposition to this request.

We request an answer to this request no later than the Commission's regular meeting of September 25, 2018, with implementation subject to counsel drafting a mutually acceptable resolution.

Thank you for your attention.

Very truly yours,



Timothy S. Hollister

TSH:ekf

c: Mark S. Zamarka, Esq. (w/ att.)
Glenn Russo (w/ att.)

Exhibit E

RESOLUTION REGARDING INTERIM SEWER CONNECTION PROCEDURE

SEPTEMBER 25, 2018

WHEREAS, on June 1, 2012, Landmark Development Group, LLC and Jarvis of Cheshire ("Applicant") filed with the East Lyme Water and Sewer Commission ("Commission"), acting as the East Lyme Water Pollution Control Authority, an application "pursuant to §7-246a(1) of the General Statutes, seeking confirmation of the availability of 237,090 gallons per day of sewage disposal capacity in the Town's sewer system to serve Landmark Development's proposed residential development adjacent to Caulkins Road"; and

WHEREAS, at the public hearing on the application held on August 24, 2012, Landmark amended its application to request availability of 118,000 gallons per day of sewage disposal capacity in the Town of East Lyme's ("Town") sewer system; and

WHEREAS, the Commission held three public hearings on the application and listened to hours of testimony during those hearings. Numerous exhibits were submitted by Landmark, the Commission, and individuals for consideration during the hearing process. In making its decision the Commission is considering and taking into account all of the testimony and exhibits submitted at the three hearings; and

WHEREAS, the Commission has wide discretion in connection with the decision to supply sewer service to particular properties; and

WHEREAS, the Commission found that as of Landmark's application in 2012, the Town had between 130,000 and 225,000 gallons per day of remaining sewage treatment capacity; and

WHEREAS, Landmark appealed the Commission's capacity allocations to the Connecticut Superior Court; and

WHEREAS, the New Britain Superior Court (Cohn, J.) (the "Trial Court") allowed Landmark to conduct discovery regarding a sewer connection permit for a different development project, known as "Gateway," and allowed Landmark to supplement the record on appeal with documents related to the Gateway connection application; and

WHEREAS, on July 6, 2016, the Trial Court issued a Memorandum of Decision holding in part that:

1. The Commission "... is not required to grant the plaintiffs their request for 118,000 gallons per day ..."
2. The Commission "... must provide the plaintiffs with sufficient capacity to further development of their project, and ... may not settle on a figure that would completely foreclose the development of the plaintiffs' project."

3. The Commission "... was obligated to consider capacity when it approved the connection application for Gateway."

WHEREAS, the Commission appealed the Memorandum of Decision to the Connecticut Appellate Court; and

WHEREAS, on August 21, 2018, the Appellate Court issued its decision ("Decision") on the Commission's appeal, which upheld the Trial Court Memorandum of Decision, and held that the Commission is required to perform a sewer capacity analysis when considering applications to connect to the East Lyme sewer system; and

WHEREAS, the Commission disagrees with the Decision and has filed a petition for certification to the Connecticut Supreme Court, which is currently pending; and

WHEREAS, by a letter dated September 17, 2018, Landmark requested that the Commission approve an allocation for its full 118,000 gpd sewer capacity request, pending final resolution of its appeal; and

WHEREAS, neither the Trial Court nor the Appellate Court held that Landmark was entitled to the full amount of its capacity request, and the proceedings are stayed until the Supreme Court acts on the Commission's petition for certification. While reserving all of its rights set forth during the appeal process, the Commission nevertheless does not want to ignore the Trial Court and Appellate Court holdings that require a sewer capacity analysis be done in conjunction with a sewer connection permit application.

BE IT THEREFORE RESOLVED, that the East Lyme Water and Sewer Commission, acting as the Town's Water Pollution Control Authority, hereby enacts the following interim procedure:

1. An application to connect to the East Lyme sewer system for a project that either (a) requests a connection for more than 20 residential units or (b) requires more than 5K gallons per day of sewage treatment capacity, shall also require an application for determination of sewer capacity pursuant to General Statutes §7-246a;
2. Said application for determination of sewer capacity shall be submitted either prior to or contemporaneously with a sewer connection application;
3. An application to connect to the East Lyme sewer system may not be granted if the Commission determines that there is not adequate sewer capacity for the proposed use of land.

BE IT FURTHER RESOLVED that the above procedure does not reflect official policy or procedure of the Commission or the Town of East Lyme. Rather, it is adopted on an interim basis only in direct response to the Appellate Court Decision, and shall be in place only during the pendency of the Landmark sewer capacity appeal process. In enacting this interim procedure, the Commission does not agree with the holdings of the Trial Court Memorandum of Decision or the Appellate Court Decision. Any findings made pursuant to this interim procedure (i.e. available sewer capacity, etc.) shall be for the purposes of that sewer capacity application only, and shall not be adopted, incorporated or made part of the record in the pending Landmark sewer appeal.

Exhibit F

Appellate court rules against East Lyme in sewage capacity case

Published September 06, 2018 7:40PM | Updated September 06, 2018 8:21PM

By Martha Shanahan

In the latest step of a protracted legal battle between East Lyme's Water and Sewer Commission and the developer of a proposed housing development, an appellate court in Hartford has ruled that the commission must grant the developer more access to the town's sewer system than the commission wants to give it.

The town's lawyers plan to petition the state Supreme Court to appeal the Aug. 21 ruling, which affirms a state Superior Court judge's 2016 order that the commission must reconsider the amount of sewage capacity it is willing to grant for a proposed 840-unit residential development adjacent to the Oswegatchie Hills Nature Preserve along the Niantic River.

Over more than a decade, Landmark Development has sought to develop houses on the 236 acres it owns in the Oswegatchie Hills.

The plan has generated local opposition, which in recent years has taken the form of a coalition between Connecticut Fund for the Environment and two local groups arguing that the development would pollute the Niantic River and degrade wetlands on the property.

Landmark Development and its president, Glenn Russo, also have hit speedbumps before the town's Water and Sewer Commission, which regulates new connections to the pipes and pumps that bring sewage from East Lyme buildings through Waterford to a sewage treatment plant in New London.

A deal between East Lyme, Waterford and New London allows each town to send a certain amount of sewage to the New London sewage treatment plant — 15 percent of the plant's capacity, or about 1 million gallons a month in East Lyme's case — and limits the towns' ability to grant permission to build new sewer lines or allow new developments to connect to the existing ones.

In 2014, the Water and Sewer Commission denied Landmark's request for a guaranteed 118,000 gallons of sewage capacity per day for the development.

Landmark appealed that decision in New London Superior Court in 2014, kicking off the five-year ongoing debate in several courts over the commission's claims that the town's sewage system can't handle the amount of wastewater that a development the size of the Landmark proposal would generate.

The commission's members said that year that it could allow Landmark to generate only 14,434 gallons per day in sewage for the proposed houses, a fraction of the 118,000 gallons per day Landmark asked for in 2014.

Landmark's lawyers have argued that the commission granted the developer of a different housing complex in East Lyme, Gateway Commons, about 70,000 gallons of sewage capacity per day and told Gateway developers that the town had the capacity to handle about 100,000 additional gallons per day from the development. The commission's decision to grant that capacity to the Gateway development shows the town has "ample" sewage capacity for the Oswegatchie Hills proposal, they said.

Hartford Superior Court Judge Henry S. Cohn said in his 2016 ruling that 14,434 gallons per day is "excessively low" in light of the allocation to Gateway, and remanded the issue to the commission.

Town lawyers say the Gateway development's sewer capacity has no bearing on the Landmark case, because Gateway Commons is near one of the town's existing sewer lines and was relatively easy to connect to the system, whereas Landmark's proposal would require the construction of a new line.

The two development projects are "like apples and oranges," said East Lyme First Selectman Mark Nickerson, who is also the chairman of the Water and Sewer Commission as directed by the town's charter. "There's a difference between a connection and an extension," he said.

The appeals court dismissed that argument last month.

"Although the commission concluded that it did not have sufficient capacity to grant the plaintiff's application for up to 118,000 gallons per day, (Gateway) had effectively been granted an allocation of approximately 166,000 gallons per day," the court wrote in its ruling.

"At the end of the day that's not a valid argument," said Timothy Hollister, an attorney with the Hartford law firm Shipman & Goodman representing Landmark in the case. "The Water and Sewer Commission ... determined that the town as a whole has so much capacity that they can grant 166,000 gallons to Gateway ... but they have fought Landmark tooth and nail on every gallon of our request."

Nickerson said he is confident in the town's appeal.

The commission should have the ability to oversee management of its sewage systems without court interference, he said.

"The judges can't force us to put the sewer in there," he said.

He added that the extension of the sewer lines to the Oswegatchie Hills would constitute an unsuitable use of the town's increasingly limited capacity for adding new inputs to the sewer

system and would eat up sewage capacity the town is saving for other neighborhoods where the houses still use septic systems.

The Department of Energy and Environmental Protection has put pressure on the town to expand sewer capacity to those neighborhoods to alleviate pressure on aging septic systems, which takes priority over development proposals like the Landmark plan, Nickerson said.

"If we had unlimited capacity and unlimited funds, we would give out all sorts of capacity," he said.

m.shanahan@theday.com

Exhibit G



Timothy S. Hollister
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October 24, 2018

VIA PDF AND U.S. MAIL

Mr. Bradford C. Kargl
Municipal Utility Engineer
Town of East Lyme
108 Pennsylvania Avenue
P. O. Box 519
Niantic, CT 06357-0519

Re: Freedom of Information Act Request

Dear Mr. Kargl:

We represent Landmark Development Group LLC and Jarvis of Cheshire, LLC (together, "Landmark"). This letter is a Freedom of Information Act request made under Chapter 14 and § 1-210 of the General Statutes. We request a copy of all documents dated or created January 1, 2018 or after that relate in any way to the Water and Sewer Commission or the Town of East Lyme providing sewer capacity or connection in excess of 5,000 GPD. This request covers all uses such as residential, commercial, industrial, and institutional development and in particular, the development on Flanders Road known as "Gateway," and its Phase III commercial development, including a possible Costco store. The undersigned will pay, in advance if requested, for reasonable copying charges for the provision of these documents. Please bear in mind the statutory deadline for the Commission's response to this request as stated in General Statutes § 1-206(a), but also that this is a continuing request after the initial disclosure. The undersigned will be happy to answer any questions about the scope of this request and otherwise to expedite the response.

Very truly yours,

A handwritten signature in black ink, appearing to read "Tim Hollister".

Timothy S. Hollister

TSH:ekf

c: Mark S. Zamarka, Esq. (via pdf)
Glenn Russo, Landmark Development Group LLC (via pdf)

7037875

Exhibit H

Pazz Construction, LLC

172 Boston Post Rd

East Lyme, Ct 06333

Town of East Lyme Water and Sewer Commission,

Pursuant to East Lyme Water & Sewer Commission Regular Meeting Tuesday, September 25th,
2018 Minutes

1. An application to connect to the East Lyme sewer system for a project either (a) requests a connection for more than 20 residential units or (b) requires more than 5,000 gallons per day of sewage treatment capacity, shall also require an application for determination of sewer capacity pursuant to General Statutes 7-246a.

This letter is to serve as an application to connect for more than 20 residential units. We are currently in progress working towards an 830G project located at 90 North Bride Brook Rd.

The property is an ideal location for an 830G, the property is located within the sewer shed and is identified on the sewer mapping provided by the Town of East Lyme Water and Sewer Commission.

The property has been assessed by the Sewer Department for such a connection. This letter is to serve as notification of such project and the need for sewer capacity for this project. Our current estimate for sewer capacity is 86,250 gallons per day. We estimate the project will consist of 575 bedrooms.

Regards,

Jason Pazzaglia

Pazz Construction LLC

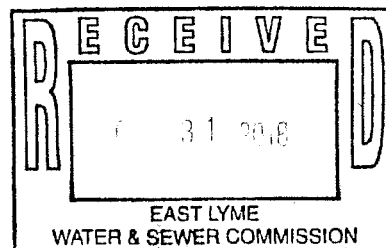


Exhibit I



Timothy S. Hollister
Phone: (860) 251-5601
Fax: (860) 251-5318
thollister@goodwin.com

November 13, 2018

VIA HAND DELIVERY

Mr. Mark Nickerson, Chair,
and Commission Members
Water and Sewer Commission
Town of East Lyme
108 Pennsylvania Avenue
P. O. Box 519
Niantic, CT 06357-0519

Mr. Bradford C. Kargl
Municipal Utility Engineer
Water and Sewer Utilities
Town of East Lyme
108 Pennsylvania Avenue
P. O. Box 519
Niantic, CT 06357-0519

Re: Landmark Development and Application of Gateway Commercial LLC for Sewer Allocation for Costco Store

Dear Chair Nickerson, Commission Members, and Mr. Kargl:

As you know, we represent Landmark Development Group LLC and Jarvis of Cheshire LLC ("Landmark"). Landmark has a legal and property right interest in the Costco application because Landmark now has a final court order directing the Commission to allocate sewer capacity to Landmark's proposed residential development on its property adjacent to the "Golden Spur" residential area; and because the Connecticut Appellate Court's August 2018 opinion specifically referenced the sewer capacity allocated to Gateway as an encroachment on Landmark's rights. Thus Landmark has a legally protected interest in this Costco application. Landmark's rights, *which stem from a 2012 application, need to be recognized and given priority over any later-filed sewer capacity application, such as Costco's.*

The courts have now confirmed that this Commission violated Landmark's rights by first denying that Landmark's property was not in the town's sewer district; then asserting that sewer was unavailable; then denying any sewer capacity, claiming it was already allocated to others; then allocating 13,000 GPD; then allocating 14,434 GPD; and then granting capacity it told the

7105448

Court it did not have to Gateway. In issuing these rulings, the courts have rejected this Commission's assertions of limited capacity, and have directed that this Commission must be transparent and accurate in calculating available capacity; may not use sewers to control land use; and must grant Landmark what it needs to proceed with its land use applications. *What Landmark needs will be determined by the land use permit process, not by this Commission.*

In response to the court rulings, East Lyme officials have been quoted as saying that "a judge can't force us" to give Landmark sewer access. Such a statement, if enforced by this Commission, will constitute contempt of court.

Therefore, in considering and before acting on the Costco application, this Commission must do the following:

1. Grant Landmark's 2012 application by allocating 100,000 GPD, conditioned upon Landmark receiving Preliminary Site Plan approval for its proposed residential development. At this time, Landmark is willing to reduce its capacity allocation application from 118,000 GPD to 100,000 GPD, in an effort to resolve the matter. It is important to recognize that this is a *maximum* that will likely be reduced by the land use permit process. This Commission must grant Landmark's application conditionally and allow the land use permitting process to determine what portion of the allocation will actually be used. Moreover, another public hearing on Landmark's application is unnecessary, because the Commission's obligation is clear.

2. Recapture, and regard as available for town use, the capacity reserved to State that will never be used. At this time, although the Town has ample capacity to grant Landmark's application, the Town needs to request that the State of Connecticut to release the capacity, contracted for in 1990, that has never been used and will never be used. Several hundred thousand GPD reserved for state facilities plainly will never be used. The Town has a legal obligation to request the State to release this capacity; the 1990 contractual reservation is now factually and legally unsupportable. In a recent, similar case, the New Jersey Supreme Court held that a town's refusal to recapture contracted but never-to-be-used capacity was an illegal sewer system management practice. *See 388 Route 22 Readington Realty Holdings, LLC v. Township of Readington*, 221 N.J. 318, 113 A.3d 744 (2015) (copy enclosed). This recapture requirement may also apply to other overstated, unused allocations such as the Point O'Woods allocation.

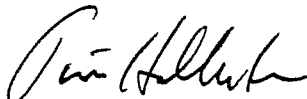
In summary, this Commission, in considering the Costco application, must at this time conditionally grant Landmark 100,000 GPD of sewer discharge capacity, and protect this grant

November 13, 2018

Page 3

against other applications filed after 2012. This allocation should be set aside and preserved until such time as Landmark obtains Preliminary Site Plan approval of its development plan, at which time the Commission will approve the actual amount to be used.

Very truly yours,

A handwritten signature in black ink, appearing to read "Tim Hollister", written in a cursive style.

Timothy S. Hollister

TSH:ekf

Enclosure

c: Mark S. Zamarka, Esq. (w/ enc.)
Landmark Development Group LLC (w/ enc.)

Exhibit J

**EAST LYME WATER & SEWER COMMISSION
PUBLIC HEARING I
Tuesday, NOVEMBER 13th, 2018
MINUTES**

The East Lyme Water & Sewer Commission held a Public Hearing on November 13, 2018 at Town Hall, 108 Pennsylvania Avenue, Niantic, Connecticut on the Application of GDEL Commercial for determination of sewer capacity for a Costco Retail Store at 284 Flanders Road, Map 31.3, Lot 1. Chairman Nickerson called the Public Hearing to order at 6:32 PM.

PRESENT: Mark Nickerson, Chairman, Steve DiGiovanna, Dave Jacques, Dave Murphy, Joe Mingo, Carol Russell, Roger Spencer, Dave Zoller

ALSO PRESENT: Attorney Theodore Harris, Representing the Applicant
Attorney Edward O'Connell, Town Counsel
Attorney Mark Zamarka, Town Counsel
Joe Bragaw, Public Works Director
Brad Kargl, Municipal Utility Engineer

ABSENT: Dave Bond

Pledge of Allegiance

The Pledge was observed.

FILED IN EAST LYME
CONNECTICUT
Nov 20 2018 AT 10:03 AM/PM
[Signature]
EAST LYME TOWN CLERK

Public Hearing I

- ♦ **Application of GDEL Commercial, LLC for determination of sewer capacity for a Costco Retail Store at 284 Flanders Road, Map 31.3, Lot 1.**

Chairman Nickerson called the Public Hearing to order at 6:32 PM. He noted that the Notice of Public Hearing had been published in the New London Day on November 1, 2018 and November 8, 2018. He then called upon the applicant or the applicant's representative to present their request.

Attorney Theodore Harris, representing the applicant said that the Costco would be located to the west side of Flanders Road along I-95. Costco is the large format store under the Master Plan for the Gateway District that was approved by the Zoning Commission in 2008. Design and approvals for the Costco have been in process over the last several years and currently all local, State and Federal permits have been obtained. The application for a building permit has been filed and should be approved within these next few weeks. There was a demand for residential housing and that component was developed; during that time the Costco interest developed. He noted the spreadsheet comparatives on other Costco stores sewer demand that he had presented. This was entered as **Exhibit 1**. He said that the actual is less than what was calculated and that they had also found the same to be true with the residential component – the actual is less than what was originally calculated. This is anticipated to be the same.

Ms. Russell asked about statistics for the Food Court, Meat department and why the bathrooms were not included.

Attorney Harris said that the Food Courts and Meat Departments are constants and maximum demand areas – just as they would be with the store in East Lyme.

Mr. Jacques asked where the 99 GM came from in the email.

Mr. Kargl and Mr. Harris said that it is from an actual meter reading.

Mr. Spencer noted that the calculation would not come out correctly.

Mr. Nickerson said that they have provided very real data from actual comparative stores.

Mr. Murphy asked if it would have a brown water system.

Mr. Harris said that he was not sure.

Mr. Nickerson said that they would be using well water for irrigation, etc.

Mr. Nickerson asked if there were any comments from the public -

Attorney Timothy Hollister, place of business, Hartford, CT; representing Landmark Development said that he had a letter that he submitted and would like to read into the record. **(Exhibit 2)** He noted that Landmark has a legally protected interest in the Costco application as outlined in his letter. He asked where the capacity study was for the Costco request as he had not heard anything on it. He noted that Gateway did not begin until late 2012 and that Landmark's application preceded it.

Attorney Roger Reynolds, place of business not identified, - representing Friends of Oswegatchie Hills and Save the River, Save the Hills as interveners with regard to the Landmark application said that he objected to what Attorney Hollister had said with regard to the Courts on the capacity issue in relation to the remaining capacity and what they should allow Landmark.

Mr. Nickerson said that while he is trying to give some leeway here that he wants to stay focused on the Costco application as there are other applications that will also be coming before them in the future.

Mr. Reynolds said that Landmark's assessment is not related to Costco.

Mr. Harris said that he did read the Court memorandum and noted that Gateway was already granted 160,000 gpd and that they really could use some of that. His letter to the Commission was submitted and entered as **Exhibit 3**.

Mr. Nickerson asked if there were other comments.

****MOTION (1)**

Mr. Mingo moved to close the Public Hearing.

Mr. DiGiovanna seconded the motion.

Mr. Nickerson noted that they would have other applications coming before them for sewer capacity.

Mr. Kargl said that information was based on the Weston & Sampson study of 2012 and that since that time he has taken the data and come up with an analysis on gpd available (262,000 gpd) – based on the maximum monthly average over six (6) years. He noted that the New London plant has 10M gpd of maximum capacity which they cannot exceed.

Mr. Nickerson noted that the 262,000 gpd is a moving target and that the 7,650 gpd request is approximately 3% of our capacity.

Attorney Hollister said that what Mr. Kargl just explained is the essence of the capacity study. He would like him to circulate his analysis and for them to postpone closing the public hearing as they have a right to review that information.

A vote was called for the motion and second on the floor.

Vote: 8 – 0 – 0. Motion passed.

Mr. Nickerson closed this Public Hearing at 7:14 PM.

Respectfully submitted,

Karen Zmitruk,
Recording Secretary
(Exhibits 1, 2 & 3 attached)

Exhibit K

**EAST LYME WATER & SEWER COMMISSION
REGULAR MEETING
TUESDAY, NOVEMBER 13th, 2018
MINUTES**

The East Lyme Water & Sewer Commission held a Regular Meeting on Tuesday, November 13, 2018 at the East Lyme Town Hall, 108 Pennsylvania Avenue, Niantic, CT. Chairman Nickerson called the Regular Meeting to order at 7:15 PM immediately following the previously scheduled Public Hearing.

PRESENT: Mark Nickerson, Chairman, Steve DiGiovanna, Dave Jacques, Dave Murphy, Joe Mingo, Carol Russell, Roger Spencer, Dave Zoller

ALSO PRESENT: Attorney Theodore Harris, Representing the Applicant
Attorney Edward O'Connell, Town Counsel
Attorney Mark Zamarka, Town Counsel
Joe Bragaw, Public Works Director
Brad Kargl, Municipal Utility Engineer
Anna Johnson, Finance Director

FILED IN EAST LYME
CONNECTICUT
NOV 20 2018 AT 10:03 AM PM
Brad Kargl
EAST LYME TOWN CLERK

ABSENT: Dave Bond

1. Call to Order / Pledge of Allegiance

Chairman Nickerson called the Regular Meeting of the East Lyme Water & Sewer Commission to order at 7:15 PM immediately following the previously scheduled Public Hearing which was closed at 7:14 PM. The Pledge was previously observed.

2. Approval of Minutes

- Public Hearing Meeting Minutes – October 23, 2018
- Regular Meeting Minutes – October 23, 2018

Mr. Nickerson called for a motion or any discussion or corrections to the Public Hearing Meeting Minutes or Regular Meeting Minutes of October 23, 2018.

****MOTION (1)**

Mr. DiGiovanna moved to approve the Public Hearing Meeting Minutes and the Regular Meeting Minutes of October 23, 2018 as presented.

Mr. Zoller seconded the motion.

Vote: 6 – 0 – 2. Motion passed.

Abstained: Mr. Nickerson, Mr. Jacques

3. Delegations

Mr. Nickerson called for delegations.

There were no delegations.

4. Consider Allocation of Sewer Capacity for Costco

Mr. Mingo said that the 160,000 gpd that was approved for Gateway does not necessitate going any further as the Costco can get capacity from there.

Mr. Nickerson said that they should go through the process anyways – they are looking for 7,650 gpd from the approximate 262,000 gpd available.

Mr. Mingo asked for the Attorney to rule on it.

Attorney Zamarka, Town Counsel said that the 160,000 gpd is a court analysis. He noted that they are here by Resolution and added that Attorney Hollister is correct that Landmark does have an interest in the Costco application as the Landmark application is also out there for capacity. Costco does need to be analyzed for available capacity.

Mr. DiGiovanna asked if that isn't what Brad came up with in his analysis.

Mr. Kargl said that he would feel more comfortable with his analysis once he has conversation with the DEEP on it and receives their input.

Mr. Mingo asked if he would be correct that they should not put a motion on the floor and asked Counsel if that is within the parameters.

Attorney Zamarka said that it would not be out of order as long as it would not exceed the 118,000 gpd that Landmark is seeking.

****MOTION (2)**

Mr. Mingo moved to grant Costco sewer capacity in the amount of 7,650 GPD as requested.
Mr. DiGiovanna seconded the motion.

Ms. Russell said that she has a concern with going with an estimate on the 262,000 gpd rather than a more definitive number.

Mr. Nickerson said that he has enough confidence in Mr. Kargl that he is pretty accurate and further the Court is aware of the number of 160,000 gpd given to Gateway. Further, he added that he would love to pursue the State capacity that is sitting out there unused even though they claim that they will use it.

Ms. Russell said that she feels that it is difficult to wrap yourself around as the figures fluctuate.
Mr. Kargl said that is exactly why he took an average.

Mr. Mingo said that based on the new resolution that those below 5,000 gpd can just have it – two of those added together will have eaten up the 7,650 gpd and then some so it is a moot point.

Mr. Jacques asked Mr. Kargl what he would be asking the DEEP.

Mr. Kargl said that he would be asking what they would be looking at as it states that we have 15% of the 10M gpd but what is the metric that is being used and is that the starting number.

Mr. Mingo asked Mr. Kargl what the next step would be.

Mr. Kargl asked that he be allowed to complete the process that he has started.

Mr. Nickerson called for a vote on the motion.

Vote: 7 – 1 – 0. Motion passed.

Against: Ms. Russell

(Note: a brief break was taken here)

5. Set Public Hearing Dates for Sewer Capacity Applications

Mr. Nickerson asked Attorney Zamarka for input.

Attorney Zamarka said that in following the land use statutes for time frames that he would suggest that any new application public hearings are set towards the farther end.

Mr. Nickerson said that they would have to set more meetings as there are a number in the pipeline so the parameters will have to be set. They would have to determine if they would give sewer capacity 'tickets' and if they would have an expiration date. They have specific meeting dates to establish procedures.

Attorney Zamarka said that he is not aware of other applications that were specific to this and not a zoning application. He suggested that perhaps as of this date that they have 65 days to schedule.

Mr. Mingo asked for a legal opinion regarding what would stop the Old Lyme beaches from going to Waterford or New London for sewer capacity and bypassing us completely. Attorney O'Connell, Town Counsel said that the DEEP does not recognize beach communities as a WPCA agency. Those communities are a quasi-municipality and are communities that are set up by special act.

Mr. Nickerson suggested that they set the public hearing for JAG, Gateway II (120 apartments) and Pazzaglia for January before their regular meeting on that same evening as long as it falls within the 65 days. It was determined that they would have to hold that public hearing on January 8, 2019. Mr. Nickerson asked Mr. Kargl to have the capacity information for them for their December meeting.

6. Landmark Remand Hearing Procedure

Attorney Zamarka noted the current status of the case for Landmark and that it was remanded a number of times. The latest being that in August the Judge upheld the decision of Judge Cohen's ruling. They petitioned the Supreme Court and the Supreme Court denied their petition so Judge Cohen's decision stands. He explained that while the 14,000gpd figure was low that it does not mean that the 118,000gpd that they requested has to be granted. The Commission has to grant somewhere between the 14,000 gpd and 118,000 gpd while taking into consideration that they cannot deny use of the property or make it non-usable. He noted that the New Jersey case that was cited in Attorney Hollister's letter would not be relevant here. He added that Attorneys Hollister and Reynolds have requested to address the remand process in the Landmark case.

Mr. Nickerson asked if he would suggest how/when they should proceed. Should they set up special meetings.

Attorney Zamarka said that he feels that it would be in their best interest to reach a decision on the Landmark capacity prior to the other applications. They have more than sufficient information to work with on that and would concur that special meetings should be set.

Mr. Mingo said that he takes issue with listening to anymore attorneys this evening and that without the capacity figure that it is a waste of time.

Mr. Nickerson said that he would allow them only three (3) minutes each and asked that they focus on the remand issue.

Attorney Hollister said that he mostly agrees with Mr. Mingo especially on the capacity issue/DEEP as otherwise they are flying blind. He cautioned that their decision cannot be on controlling land use and that the decision is between 14,000 gpd and the new figure that they provided this evening of 100,000 gpd but should be no where near the 14,000 gpd. They need to get a fair number and that legally they should be granted the 100,000 gpd and then let the land use arena make their determination.

Attorney Reynolds said that Attorney Hollister has said that they have to allow the project to proceed but that is not what was said. While they cannot shut down the project, 814 units are not reasonable as there has not been an 800 unit project in this area. Gateway may in the end be 400 units but that would have been the maximum number so 814 units are just unreasonable. Further they haven't actually seen projects of more than 100 units so to do that size project would be far less than for the 800 that they are seeking.

Mr. Nickerson said that they would have their Regular Meeting on December 11, 2018 and a Special Meeting on December 18, 2018 for the Landmark remand.

Mr. Mingo noted that they need to remember that they are not a land use agency.

7. Waterford/Three Beaches Letter

Mr. Nickerson asked Attorney O'Connell to review this.

Attorney O'Connell explained that they had received a letter from Chairman Green of the Waterford Utility Commission stating that they object to East Lyme contracting with three (3) beach communities

(Old Lyme) to take their sewer flow as that flow will affect Waterford's sewer system infrastructure without Waterford approving the terms and conditions of use. Mr. Nickerson sent a letter in response stating that they could not find anything prohibiting it and that in fact they were ordered by the CT DEEP to accept sewage flow from the beach communities and to enter into an agreement with them. This was imposed upon East Lyme and the DEEP did not order Waterford to do anything. Also, East Lyme paid Waterford a substantial sum for the right to transmit sewage (up to 8M gpd) through Waterford's mains.

8. Billing Adjustments

There were none.

9. Approval of Bills

Mr. Nickerson called for a motion on the Niantic & Pattagansett Pump Station PER bill.

****MOTION (3)**

Mr. DiGiovanna moved to approve payment of the following Niantic & Pattagansett Pump Station PER bill: Weston & Sampson, Inv, #485250 in the amount of \$58,605.00.

Mr. Zoller seconded the motion.

Vote: 8 - 0 - 0. Motion passed.

Mr. Nickerson called for a motion on the Booster Station Upgrades bills.

****MOTION (4)**

Mr. DiGiovanna moved to approve payment of the following Booster Station Upgrades bills: Integrated Control Systems Inv. #3202 in the amount of \$5,700.00 and Integrated Control Systems Inv. #3203 in the amount of \$710.00.

Mr. Zoller seconded the motion.

Vote: 8 - 0 - 0. Motion passed.

Mr. Nickerson called for a motion on the Water Main Improvement bills.

****MOTION (5)**

Mr. DiGiovanna moved to approve payment of the following Water Main Improvement bills: B&L Construction Inv. #73558 in the amount of \$12,193.00 and B&L Construction Inv. #73559 in the amount of \$5,311.49.

Mr. Spencer seconded the motion.

Vote: 8 - 0 - 0. Motion passed.

10. Finance Director Report

Ms. Johnson said that she would get the information to them once all of it was entered into the system as it was not ready at this time. She recalled that she had requested the closing out of projects and that had been done along with another one that was completed.

11. Water & Sewer Operating Budget Status Reports

Mr. Bragaw noted that they had been provided with the spreadsheet as well as the assumptions that he had made with regard to the Well 1A and 6 upcoming projects. He noted that it assumes a 2.75% water budget increase each year over the next eight (8) years. There are anticipated increased revenues as well and with all of this in mind he said that he felt that they could reasonably afford going forward with the Well 1A and 6 projects while still being able to pay for and implement the meter replacement project. He also noted that they need to get out of the meter deposit business.

12. Water Project Updates

▪ Well 1A and 6 Treatment Plant Modifications and Upgrades – Discussion and Possible Project Authorization for Construction Phase

Mr. Kargl recalled that the issue here was affordability and that Mr. Bragaw was working on that aspect. Mr. Bragaw explained that they had a debt spike this year but then it goes way down so he felt for the reasons cited above that they could afford this project.

****MOTION (6)**

Mr. DiGiovanna moved to forward the Well 1A and Well 6 Water Treatment Project with an estimated cost of \$4,640,000 to the Board of Selectmen for approval and to begin the authorization process.

Mr. Zoller seconded the motion.

Vote: 8 – 0 – 0. Motion passed.

13. Correspondence Log

There were no comments.

14. Chairman's Report

Mr. Nickerson reported that he had held a meeting on a new Public Safety building going forward and that the proposed project is for \$6M for the current Honeywell building as they are leaving their building here and moving to another area in Connecticut. They have made a purchase and sales agreement that is contingent upon all approvals. They need to get the Police out of the downtown building which has a lot of issues not to mention space. He said that he would like to do this within 120 days and get it to referendum as it is a very important project and this building is well set up for this and for future expansion of the important emergency management system.

15. Appoint Water Regulations Subcommittee

Mr. Bragaw said that they are moving forward with the water regulations as this is necessary to support the meter replacement project.

Mr. Mingo said that the subcommittee that is for the sewer regulations serves for both – so they would also work on the water regulations.

Mr. Bragaw asked if Mr. Mingo, Mr. Zoller and Ms. Russell are still interested in serving on this subcommittee and if anyone else wishes to serve on it, they could let him know.

16. Assistant Utility Engineer Update

Mr. Bragaw said that they held interviews and that the skill set is a tough one. They have found that they need very strong water skills so they decided to go back out and advertise again for that certain type of person and skill set as he suspects that some of the people who may have been interested were very strong with the water side but did not apply due to how the description was worded. They will re-advertise and re-assess.

17. Staff Updates

a. Water Department Monthly Report

Mr. Murphy noted that there is still 31% that has to come from New London as we have only taken 69%. He asked if they are going to make it before they have to start pumping back.

Mr. Kargl said that they are using it to flush the hydrants in the north end of Town and that Well 1A will also go off for surging so that will mean that they will utilize more. He said that he is hoping that they will get close to the 100%.

b. Sewer Department Monthly Report

There were no comments.

18. Future Agenda Items

No comments.

19. ADJOURNMENT

Mr. Nickerson called for a motion to adjourn.

****MOTION (7)**

Mr. Murphy moved to adjourn this Regular Meeting of the East Lyme Water & Sewer Commission at 8:51 PM.

Mr. DiGiovanna seconded the motion.

Vote: 8 – 0 – 0. Motion passed.

Respectfully submitted,

Karen Zmitruk,
Recording Secretary

Exhibit L

NO. HHD LND CV 15 6056637S	:	SUPERIOR COURT
	:	
LANDMARK DEVELOPMENT	:	
GROUP LLC, ET AL.	:	JUDICIAL DISTRICT
	:	OF HARTFORD
v.	:	LAND USE DOCKET
	:	
EAST LYME WATER AND SEWER	:	
COMMISSION	:	NOVEMBER 27, 2018

AFFIDAVIT OF GLENN RUSSO

I, GLENN RUSSO, being duly sworn, depose and state as follows:

1. I am over the age of 18 and believe in the obligations of an oath.
2. I am a resident of Middletown, Connecticut.
3. I am President of Landmark Development Group, LLC and Jarvis of Cheshire, LLC.
4. At its regular meeting on November 13, 2018, the Commission scheduled a special meeting for December 11, to consider what new criteria it will devise and use to act on Landmark's application on remand.
5. During the November 13 discussion, Chair Nickerson stated that action on Landmark would be based on "what is fair, given the size of our town."
6. At the November 13 meeting, Attorney Roger Reynolds, representing environmental intervenors, advocated that the Commission base the sewer allocation on controlling land use, by granting capacity for 110 residential units (about 20,000 GPD), that being the "average size" of a § 8-30g affordable housing development.
7. At the November 13 meeting, the Commission discussed action in January 2019 on other sewer capacity applications, including 120 additional residential units for Gateway (and thus above its 275 unit plan; and a new application seeking 86,000± GPD.

8. At the November 13, 2018 hearing on the Costco application, Sewer Administrator Kargl stated that the Gateway residential portion is actually using "about half" of its projected need.

9. At the November 13, 2018 hearing, none of the Commissioners or the Town Attorney discussed giving Landmark's application, which dates to 2012, priority over applications filed later, much less in 2018.



GLENN RUSSO

Subscribed and sworn to before me
this 27th day of November, 2018.



Commissioner of the Superior Court
Notary Public / My Commission Expires

CHRISTAL SHEPPARD
NOTARY PUBLIC
MY COMMISSION EXPIRES MAR. 31, 2022



Exhibit M

Sewer Department Monthly Report

Nov-17

Oct-17 Monthly Running Avg: 822,550 GPD
 Daily Avg: 752,273 GPD
 Daily Max: 952,760 GPD
 Daily Min: 676,560 GPD

Daily Average as a Percent of Monthly Running Average: 91.46%
 Daily Average as a Percent of 1.5 MGD Allotment at NLWWTP: 50.15%

State CT Flows:

	DOC	Camp Niantic	Rocky Neck	POW	Total
Actual GPD AVG.	149,741	4,555	0	9,713	164,009
Design GPD AVG.	250,000	58,400	64,600	105,000	478,000
% of Design GPD	59.9%	7.80%	0	9.25%	34.31%
% of East Lyme Average Daily Flow	19.91%	0.61%	0.00%	1.29%	21.80%
% of East Lyme 1.5 MGD Allotment	9.98%	0.30%	0.00%	0.65%	10.93%

Footnotes:

NR = No Reading

EAST LYME WATER & SEWER COMMISSION	
NOV 14 2017	
AGENDA #	146

EXHIBIT B

EAST LYME SEWER FLOWS - HISTORY

	2010 ⁽¹⁾	2011	2012	2013 ⁽²⁾	2014	2015	2016	2017	% +/- Prev. Yr.	Precip. 2017 (in.)
JAN.	1,037,939	918,818	956,431	975,330	1,011,343	787,646	747,284	784,837	5.03%	3.87
FEB.	1,001,694	959,700	912,442	1,010,626	994,771	832,681	809,701	765,648	-5.44%	2.05
MAR.	1,424,903	1,001,537	886,778	1,139,232	1,026,812	1,017,280	790,851	777,452	-1.69%	3.89
APR.	1,341,021	938,509	915,628	1,042,500	1,126,058	938,861	796,611	897,161	12.62%	7.34
MAY	1,119,627	1,046,507	1,016,580	1,057,182	1,145,107	913,816	777,446	872,268	12.20%	6.03
JUN.	1,067,205	1,017,256	996,993	1,243,099	1,007,792	880,190	815,281	849,504	4.20%	4.83
JUL.	1,117,893	1,027,843	1,026,063	1,217,939	1,038,583	1,048,427	879,952	883,851	0.44%	2.23
AUG.	1,040,808	970,097	1,018,439	1,203,763	999,147	977,543	868,636	873,017	0.50%	2.79
SEPT.	932,705	1,167,520	912,093	1,288,056	837,706	878,563	762,544	769,493	0.91%	2.42
OCT.	928,254	966,767	949,719	1,020,390	852,281	861,521	738,247	752,273	1.90%	7.22
NOV.	869,937	983,082	963,598	928,615	787,769	803,842	709,481		-100.00%	
DEC.	882,347	1,133,107	983,849	944,611	835,260	788,121	728,649		-100.00%	
AVG.	1,063,694	1,010,895	961,551	1,089,279	971,886	894,041	785,390	822,550	3.07%	
										Precip. Total 42.67

(1) March 30, 2010 storm event - 8.88 inches of rain/16.43 inches of rain for the month (Well 3A/3B rain gauge)

(2) 10.65 inches of rain for June 2013 (Well 3A/3B rain gauge)

7.18 inches of rain for July 2013 (Well 3A/3B rain gauge)